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Nos. 84-325 and 84-356

In the Supreme Court of the United States
OCTOBER TERM, 1984

METROPOLITAN LIFE INSURANCE COMPANY,
Appellant,
v.
COMMONWEALTH OF MASSACHUSETTS,
Appellee.

THE TRAVELERS INSURANCE COMPANY,
Appellant,
v.
COMMONWEALTH OF MASSACHUSETTS,
Appellee.

On Appeal From The Supreme Judicial Court
Of The Commonwealth Of Massachusetts

AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT, JOINED BY THE STATES OF CALIFORNIA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, SOUTH CAROLINA, VERMONT, WISCONSIN AND THE COMMONWEALTH OF VIRGINIA, IN SUPPORT OF APPELLEE

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IN THE SUPREME COURT OF THE UNITED STATES

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INTEREST OF AMICI CURIAE

This brief is submitted by the

amici states pursuant to Supreme Court Rule 36.4.

By the McCarran-Ferguson Act, 15 U.S.C. § 1011, et seq., Congress re-established the states' right under their police powers to regulate the business of insurance. The Court has recognized the great public interest which the states have in regulating insurance and their commensurate authority: "[T]he power of the state is broad enough to take over the whole business, leaving no part for private enterprise." California Auto. Assn. v. Maloney, 341 U.S. 105, 110 (1951).

Pursuant to this authority, the amici states have regulated the business of health insurance by mandating policy

provisions, particularly in group policies. [1/] For example, the State of Connecticut mandates that the following

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1/ See generally Brummond, Federal Preemption of State Insurance Regulation Under ERISA, 62 Iowa L.Rev. 57 (1976); Manno, ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action, 52 Temp. L. Q. 51 (1979); Okin, Preemption of State Insurance Regulation by ERISA, 13 Forum 652 (1978); Rottman, Rawls, and Gollaher, National Association of Insurance Commissioners Statement on Federal Preemption of State Insurance Regulation under Section 514 of ERISA, 1 NAIC Proceedings 1977, 237 (July 21, 1976).

Amici states of Connecticut, Kansas, Maine, Maryland, Minnesota, Montana, New York, North Dakota, Virginia, and Wisconsin have mandated benefit statutes requiring that benefits be provided for mental health treatment. Conn. Gen. Stat. § 38-174d; K.S.A. 40-2,105; 24A M.R.S.A. § 2843 (Supp. 1983-84); Md. Ann. Code Art. 48A, § 477E (Michie Supp. 1984); Minn. Stat. Ann. § 62A.152 (West Supp. 1984); Mont. Code Ann. §§ 33-22-701 to 704 (1983); N.Y. Insur. Law 162 (16); N.D. Cent. Code § 26-39-03 to -04 (1978); Va. Code § 38.1-348.7 (1981); Wis. Stat. Ann. § 632.89 (West 1980 and Supp. 1983-84).

provisions be included in group health policies: Conn. Gen. Stat. §§ 38-174d (minimum mental illness benefits), 38-174e (non-termination of coverage for mentally retarded or physically handicapped dependent children), 38-174g (minimum newborn benefits), 38- 174h (certain payments to dentists), 38-174i (minimum drug overdose benefits), 38-174j (prohibition of offsets based on disability benefits), 38-174k (minimum home health care benefits), 38-1741 (minimum home health care benefits provided by a recognized nonmedical system), 38-174m (minimum loss ratio in medicare supplement policies), 38-174n (lien on workers' compensation awards), 38-174o (standards for third party prescription programs), 38-174p (offer of coverage for comprehensive rehabilitation services), 38-174q

(minimum occupational therapy benefits), 38-262b (minimum alcoholism treatment benefits), 38-262c (standards for cancellation or discontinuance of coverage), 38-262d (conversion and extension rights), 38-262f (offer of coverage for outpatient treatment of alcoholism), 38-262g (limitation on spousal premium charges), 38-262h (spousal coverage as employee and dependent), 38-262i (minimum benefits for treatment of tumors and leukemia), 38-262j (prohibition against age discrimination) and Conn. Gen. Stat., Chapter 692 (minimum benefits and policy provisions for group Comprehensive Health Care Plans).

Although the statute before the Court, Massachusetts General Laws, Chapter 175, § 47B (Section 47B),

pertains only to mandatory minimum mental health benefits, a holding of preemption under § 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C § 1144(a), would remove many other benefits and protections provided in group health insurance policies enjoyed by the citizens of various states and throw them into what some commentators have referred to as "the regulatory void." 2/ Moreover, Appellants' arguments of preemption under ERISA and the National Labor Relations Act, 29 U.S.C. § 151 et

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2/ Brummond, supra, at 117-20; Rottman, supra, at 291-97. Additionally, a holding of preemption would place both the industry and the state regulators in the difficult position of ascertaining

Continued on next page.

seq., (NLRA), if adopted by the Court, would seriously erode, if not eliminate, state supremacy in the regulation and control of the health insurance business. Thus, the amici states have substantial interests in the proper resolution of the questions presented in these appeals.

Amici states file this brief in support of the Commonwealth of Massachusetts urging that the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts be affirmed.

Footnote 2 continued:

whether the purchaser of a group health insurance policy is a qualified employee benefit plan under 29 U.S.C. §§ 1002(1) and 1003(a) to determine whether state insurance law applies to the policy. Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982), provides insight into some of the difficulties in determining whether an ERISA-qualified employee benefit plan does exist.

SUMMARY OF ARGUMENT

A statute of the Commonwealth of Massachusetts mandating that insurance companies provide minimum mental health benefits in general insurance policies which may be purchased by employee benefit plans does not relate to employee benefit plans within the meaning of 29 U.S.C. § 1144(a) as construed in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), and Shaw v. Delta Air Lines, Inc., _____U.S._____, 103 S.Ct. 2890 (1983).

Even if it were to be found that such a statute relates to employee benefit plans, it would be saved from preemption under the terms of ERISA's savings clause, 29 U.S.C. § 1144(b)(2)(A). This is the only result consonant with the McCarran-Ferguson Act

and ERISA, 29 U.S.C. § 1144(d), and is necessary to avoid rendering the savings clause and the deemer clause, 29 U.S.C. § 1144(b)(2)(B) surplusage.

Preemption under the National Labor Relations Act is based on two doctrines, the first preempting state regulation concerning conduct arguably protected or prohibited by the NLRA and the second preempting state regulation of conduct intended by Congress to be unregulated. The latter doctrine, which governs this case, is restricted to state regulation affecting the balance of power in collective bargaining negotiations and requires a substantial effect on such balance of power. The Massachusetts statute does not affect the balance of power in negotiations and does not have a substantial effect on the negotiation of terms of agreements

in view of its tangential relation as health legislation to the collective bargaining process and its tolerance of the alternative of providing benefits without insurance.

The doctrine governing this case recognizes also a balancing of the state interest in regulation against the potential interference with the federal interest. The state interest in health underlying the Massachusetts statute outweighs the limited effect on negotiation of terms of agreements.

Furthermore, the statute is not preempted since Congress intended to allow state regulation of insurance under the McCarran-Ferguson Act. The provision of the McCarran-Ferguson Act for application of the NLRA to the business of insurance refers only to the labor relations of insurance companies.

ARGUMENT

I.

A STATUTE OF THE COMMONWEALTH OF MASSACHUSETTS MANDATING THAT INSURANCE COMPANIES PROVIDE MINIMUM MENTAL HEALTH BENEFITS IN GENERAL HEALTH INSURANCE POLICIES WHICH MAY BE SOLD TO EMPLOYEE BENEFIT PLANS ESTABLISHED PURSUANT TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 29 U.S.C. § 1001 ET SEQ., IS NOT PREEMPTED BY 29 U.S.C. § 1144(a)

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), provides in part: "Except as provided in subsection (b) of this section, the provisions of this subchapter...shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." The noted exception to this preemption clause, 29 U.S.C. § 1144(b)(2)(A), is a broad savings clause for certain state laws and reads as follows: "Except as provided in

subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."

The subparagraph (B) exception to this savings clause protects only employee benefit plans and their trusts by providing that they shall not be deemed, inter alia, to be an "insurance company or other insurer...or to be engaged in the business of insurance...for purposes of any law of any State purporting to regulate insurance companies, [or] insurance contracts...."

Finally, Congress clearly indicated its intent that ERISA was to have no effect on any existing federal legislation by the following language in 29 U.S.C. § 1144(d):

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

Thus, in order to hold that a state statute mandating that insurance companies provide specific health benefits in general insurance policies is preempted by ERISA, the Court must first find that the statute "relates to" employee benefit plans for the purposes of the general preemption clause, 29 U.S.C. § 1144(a). If a determination is made that the statute relates to employee welfare benefit plans, and a further finding is made that the statute does not regulate insurance within the savings clause, 29 U.S.C. § 1144(b) (2)(A), only then will the state law be held to be preempted.

A. The Statute Does Not Relate To Employee Benefit Plans

In order to come within the ambit of ERISA preemption, a state law must "relate to" an employee benefit plan.

In Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 524 (1981), a New Jersey workers' compensation statute banning pension benefit offsets based on workers' compensation was held to relate to employee benefit plans within the meaning of 29 U.S.C. § 1144(a). Having found that ERISA permitted all employee benefit plans to make pension benefit offsets based on workers' compensation, the Court concluded that the "relate to" requirement was met since the New Jersey statute directly deprived employee benefit plans of a "calculation technique" permissible under federal law. Id. at 524-25.

In Shaw v. Delta Air Lines, Inc., ____U.S.____, 103 S.Ct. 2890, 2900 (1983), the Court held that the New York Human Rights Law related to employee benefit plans to the extent that it prohibited practices (providing discriminatory benefits) permitted by federal law and that, similarly, the New York Disability Benefits Law related to employee benefit plans insofar as it required employers offering the plans to provide specific disability benefits.

All three state statutes under consideration in Alessi and Shaw did "relate to" employee benefit plans because they applied directly to the plans and gave the plans no choice but to significantly change or alter the benefits payable under the plans. In the present case, however, the state

statute applies only to insurance companies issuing general health insurance policies which may or may not be purchased by employee benefit plans. The plans clearly are not forced to comply with these laws, but may elect to become self-insurers.

That the state statute at issue here, Section 47B, applies only to group insurance policies and not employee benefit plans, is evidenced by the fact that the action was brought only against insurance carriers who issue the affected policies and not against employers or employee organizations who

offer employee benefit plans or the plans themselves. 3/

To hold that a state statute applicable only to insurance companies issuing general health insurance policies relates to employee benefit plans and is therefore within the

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3/ Indeed, the insurance carriers who raise the issue of preemption under 29 U.S.C. § 1144(a) in this action would appear to lack the requisite standing under ERISA, 29 U.S.C. § 1132(a), had they attempted to bring suit in their own right to enforce the preemption provision of ERISA. Blue Cross and Blue Shield of Kansas City v. Bell, No. 84-2255 (D. Kan., Nov. 7, 1984) (citing Tuvia Convalescent Center, Inc. v. National Union of Hospital and Health Care Employees, 717 F.2d 726 (2d Cir. 1983); Pressroom Union-Printers League Income Security Fund v. Continental Assurance Co., 700 F.2d 889 (2d Cir.), cert. denied, 104 S.Ct. 148 (1983)).

preemptive ambit of ERISA, 29 U.S.C. § 1144(a), would be an unwarranted extension of the holdings in Alessi and Shaw, and would make any state law which regulates or affects a product which an employee benefit plan may purchase or an activity in which an employee plan may engage susceptible to a claim of ERISA preemption.

B. The Statute Is Expressly Excepted From ERISA Preemption by 29 U.S.C. § 1144(b)(2)(A)

Expressly excepted from the general preemption provided in 29 U.S.C. § 1144(a) is "any law of any State which regulates insurance...." 29 U.S.C. § 1144(b)(2)(A). A state statute which mandates minimum benefits in general health insurance policies sold by insurance companies is a law which regulates insurance. Such a statute

directly regulates the relationship between the insurer and the insured and has been considered to be at the center of insurance regulation by this Court:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement-- these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was-- it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.'

S.E.C. v. National Securities, 393 U.S. 453, 460 (1969).

Several factors dictate that state mandatory benefit statutes were intended by Congress to come within the savings clause exception, 29 U.S.C. § 1144(b)(2)(A), to the general preemption provision of ERISA. First, the exception is written in the broadest language possible: "any law of any State which regulates insurance...." (Emphasis added). It has been noted that this savings clause exception to the general rule of preemption was so broad as to envelop the general rule and made it necessary to include the deemer clause exception, 29 U.S.C. § 1144(b)(2)(B), to the savings clause to prevent the direct application of state insurance laws

to employee benefit plans and, in effect, require them to become insurance companies. 4/ The deemer clause would be surplusage if Congress did not consider the savings clause exception to be extremely broad.

Since the direct application of state insurance laws to employee benefit plans is prevented by the deemer clause, the savings clause must be construed to encompass insurance laws which indirectly affect employee benefit plans, or it, too, would be rendered surplusage. Wadsworth v. Whaland, 562 F.2d 70, 78 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978).

4/ Kilberg and Inman, Preemption of State Law Under ERISA: Drawing the Line Between Laws That Do and Laws that Do Not Relate to Employee Benefit Plans, 19 Forum 162, 163 (1983).

In 1979, Congress failed to enact an amendment to ERISA that would have taken state mandatory minimum coverages in insurance out of the protection of the broad exception for insurance laws. The report of the Senate Committee on Labor and Human Resources specifically stated that the proposed amendment was intended to legislatively overrule the decision of the First Circuit in Wadsworth v. Whaland, supra. The language proposed in Senate Bill 209 read as follows:

> A State insurance law which provides that a specific benefit or benefits must be provided or made available by a contract or policy of insurance issued to an employee benefit plan is a law which relates to an employee benefit plan within the meaning of subsection (a) and is not a law which regulates insurance within the meaning of subparagraph (A)...

The ERISA Improvements Act of 1979: Summary and Analysis of Consideration, United States Senate Committee on Labor and Human Resources, 1979, pp. 46, 88; see also, 125 Congressional Record 931, 937 (1979).

It is a fundamental canon of statutory construction that an act of Congress should be construed "in such a manner as to give effect to all its parts and to avoid a construction which would render a provision surplusage." Wadsworth v. Whaland, supra, 562 F.2d at 78, citing McDonald v. Thompson, 305 U.S. 263 (1938). Any other construction of these sections of 29 U.S.C. § 1144 would render either the savings or the deemer clause, or both, surplusage. If Congress had intended to preempt any law which may have an effect on employee benefit plans, both the savings clause

and the deemer clause would have been unnecessary.

All these subsections of 29 U.S.C. § 1144 underscore and reinforce the long-standing Congressional policy of state supremacy in the regulation of the insurance business set forth in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 and 1012. 5/

5/ 15 U.S.C. § 1011 reads:

> Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012 reads in pertinent part:

Continued on next page.

The general preemptive clause, 29 U.S.C. § 1144(a), is silent as to the business of insurance and can hardly be construed to relate specifically to the business of insurance. The savings clause, 29 U.S.C. § 1144(b)(2)(A), specifically refers to insurance, but only to reinforce the non-preemptive mandate of 15 U.S.C. § 1012(b). Finally, the language of 29 U.S.C. § 1144(d) clearly indicates Congressional intent that nothing in ERISA is to be construed to alter the status quo of other federal legislation.

Footnote 5 continued:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

Continued on next page.

Thus, a fundamental canon of statutory construction, the McCarran-Ferguson Act, and the language of 29 U.S.C. § 1144(d) of ERISA, lead to the conclusion that ERISA does not preempt a state insurance statute directly applicable to insurance companies and the terms of the policies they issue.

Footnote 5 continued:

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance....

II.

THE MASSACHUSETTS STATUTE IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

A. The Massachusetts Statute Lacks a Substantial Effect On Negotiation Of An Agreement And The Balance Of Power In Collective Bargaining

1. Preemption Requires a Substantial Effect On Negotiation of an Agreement and the Balance of Power in Collective Bargaining

This Court has recognized two distinct approaches to preemption of state regulation by the National Labor Relations Act. The first approach preempts state regulation concerning conduct that is arguably prohibited or protected by the Act. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). The second approach prohibits state regulation having a substantial effect on conduct

that Congress intended to be unregulated, specifically conduct involving the self-help remedies left to the parties in labor disputes. Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 140, 147-148 (1976). The existence of these two doctrines of NLRA preemption has been confirmed by the Court on several occasions. Belknap, Inc. v. Hale, ___ U.S._____, 103 S.Ct. 3172, 3176-77 (1983); New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 527-531 (1979); Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, supra, 427 U.S. at 138-140.

In Belknap, Inc. v. Hale, supra, _____U.S._____, 103 S.Ct. at

3177-81, the Court's application of the Machinists doctrine recognizes the more limited preemption under that doctrine than under Garmon. The Court requires a determination of actual effect of the state regulation on conduct intended by Congress to be unregulated. By contrast, Garmon requires only a showing of state regulation of conduct arguably protected or prohibited by the Act. There is no requirement under Garmon of establishing the practical effects of the state regulation on that conduct.

This distinction between Garmon and Machinists is clearly indicated by the Court in Belknap. Its application of Garmon is premised on state regulation of conduct arguably protected or prohibited by the Act. Id. at ___, 103 S.Ct. at 3181-82. Its application of

Machinists, however, undertakes careful inquiry into the degree of effect of the state regulation on conduct that Congress intended to be unregulated.

The Court's application of Machinists in Belknap is marked by its focus on the tangential relation of suits for damages by replacements to the federal recognition of the employer's rights with respect to hiring replacements during a strike. The Court regards the infliction of injury on third parties as tangential to the rights of employer and union to use economic weapons against each other. Id. at ____, 103 S.Ct. at 3177-78. The Court further rejects the argument of serious detriment to the employer from the conditioning of offers to the replacements in order to avoid a breach

of contract, should the employer be ordered to reinstate strikers or should a settlement require reinstatement. Id. at ___, 103 S.Ct. at 3178-79. The Court then undertakes a calculation of the effects of the state regulation on federal rights. The Court discerns no substantial impact on settlement of strikes since the employer can condition offers to replacements to avoid suits for damages. Id. at ___, 103 S.Ct. at 3180-81. The employer's risk of liability upon discharge of replacements under a settlement is viewed as minimal. The Court recognizes no greater effect on settlement than under preemption of suits for damages.

The critical aspect of the Court's approach is its reliance on calculating the degree of effect of the

state regulation on conduct intended by Congress to be unregulated. This reliance is illustrated by the Court's comparison of the effects on federal rights with and without preemption, its emphasis on the lack of substantial impact on settlement and the minimal risk of employer liability and its recognition of the tangential relation of suits for damages to federal rights. The Court does not accept, as it does under Garmon, an approach under Machinists which requires only a conclusion that the state regulation concerns conduct in an area covered by the NLRA.

In addition to the requirement of substantial effect on conduct intended by Congress to be unregulated, the Machinists doctrine requires upsetting

the balance of power between employer and union in bargaining. This is clearly the focus in Belknap. Id. at ___, 103 S.Ct. at 3177. Machinists, too, was decided on the basis of the effects of the state law on the balance of economic weapons between union and employer. Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, supra, 427 U.S. at 148-151. In New York Telephone Co. v. New York State Department of Labor, supra, 440 U.S. at 531-533, the Court was again concerned with the effect on the balance of economic weapons between employer and union.

With respect to the intent of Congress to leave unregulated the terms of collective bargaining agreements, the Machinists doctrine must be construed as limited to state regulation affecting

the balance of power in the negotiation of the terms of such agreements. Local 24, International Brotherhood of Teamsters v. Oliver, 358 U.S. 283, 293-294 (1959). This also follows from the Congressional concern with the balance of power in leaving unregulated the terms of agreement. In H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970), the Court indicated the underlying rationale for leaving unregulated the terms of agreements. "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." Id. at 107-108.

Accordingly, the Machinists doctrine requires a substantial effect on conduct intended by Congress to be

unregulated and state regulation affecting the balance of power in negotiation of terms of agreements.

2. The Massachusetts Statute Lacks a Substantial Effect On Conduct Intended by Congress to be Unregulated

a. The Massachusetts Statute Lacks a Substantial Effect on Negotiation of an Agreement

The Court's approach in Belknap leads to the conclusion that Section 47B is not preempted by the NLRA. The tangential relation of the statute to the concerns of Congress in leaving unregulated the terms of agreement must be considered. It cannot seriously be argued that Congress had in mind the preemption of health and welfare legislation totally unrelated to regulation of collective bargaining when it sought to leave the parties free to enter into terms of agreement. Moreover,

preemption here would lead to the absurd result of preempting major pieces of critical state health and safety legislation with similar tangential effects on collective bargaining agreements. For example, state legislation on automobile seat belts and prescription drugs would be preempted.

The effects of Section 47B on collective bargaining agreements are further limited by the ability of the parties to reach agreements without the use of insurance. Employee health plans may be provided without the purchase of insurance. The statute applies only when the parties have purchased insurance.

b. The Massachusetts Statute Does Not Affect the Balance of Power in Collective Bargaining

Section 47B does not affect the Congressional concern with the balance of power in leaving unregulated the terms of agreements, since it allows the parties to negotiate benefits without purchasing insurance and, even when insurance is purchased, equally restrains each party in bargaining for other benefits.

B. The Balancing Test Between State and Federal Interests Requires a Holding Against Preemption

1. The Test for Preemption Requires a Balancing of the State Interest in Regulation Against the Potential for Interference With the Federal Interest

The Machinists doctrine is subject to the exceptions under the Garmon doctrine, which have been incorporated, under Farmer v. United Brotherhood of Carpenters & Joiners of America, Local

25, 430 U.S. 290, 297-301, 304 (1977), in a test balancing the state interest in regulation against the potential for interference with federal regulation. These include the exceptions for state regulation involving deeply rooted local interests, matters of peripheral concern to the NLRA and health and safety. Id. at 296-297, 301 n. 10, 299, 302-303. The Court in Machinists indicates that its doctrine is limited by the same exceptions as is Garmon. Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, supra, 427 U.S. at 151. The Court's acceptance of the Garmon exceptions for purposes of the Machinists doctrine is further revealed by its reference to basic exceptions to preemption of general applicability including the exceptions for deeply rooted

local interests and matters of peripheral concern to the NLRA. Id. at 136-137.

In New York Telephone Co. v. New York State Department of Labor, supra, 440 U.S. at 533-534, the plurality accepts under Farmer a distinct state regulatory purpose as an exception to preemption. It decides against preemption on the basis of the purpose of unemployment compensation statutes to provide a state program of employment security rather than the purpose to adjust bargaining power as well as Congressional intent in federal unemployment compensation statutes to allow state regulation. Id. at 533-537. The concurring opinion also recognizes the applicability of the Garmon exceptions to the Machinists doctrine such

as the exception for deeply rooted local interests. Id. at 550.

2. The State Interest in Health Under the Massachusetts Statute Outweighs Its Limited Effect on the Federal Policy of Leaving Unregulated the Terms of Agreements

Application of the Farmer balancing test to Section 47B requires a holding against preemption. The purpose of the state statute is to promote the health of citizens, not to regulate labor relations. It falls not only within the Farmer balancing test as a separate state interest but also within the specific exceptions for deeply rooted local interests in light of the state interest in the health of its citizens and for health and safety regulations.

The potential for interference in federal interests under the NLRA is limited. First, the statute, unlike the New York statute in New York Telephone Co., does not affect the balance of power between the parties in bargaining. It permits the parties to negotiate benefits without the purchase of insurance and, even when insurance is purchased, affects the terms of the collective bargaining agreement with an equal impact on union and employer. Furthermore, Section 47B as health legislation has a tangential relation to regulation of the collective bargaining process, and preemption here would have the absurd consequence of preempting critical state health and safety legislation.

Accordingly, the state's interest in the health of its citizens outweighs the potential interference with the federal policy, and the Massachusetts statute is thus not preempted by the NLRA.

C. The McCarran-Ferguson Act Establishes a Congressional Intent to Allow the Massachusetts Statute

Section 47B is not preempted by virtue of the McCarran-Ferguson Act. The Act provides in relevant part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Section 47B directly regulates insurance and insurance policies, and therefore the NLRA does not invalidate such regulation.

Attorney General v. Travelers Insurance Co., 385 Mass. 598, 613-614, 433 N.E.2d 1223, 1232 (1982). The Massachusetts statute is therefore distinguishable from the New York arbitration statute in Hamilton Life Insurance Co. v. Republic National Life Insurance Co., 408 F.2d 606, 611 (2d Cir. 1969).

McCarran-Ferguson is not rendered inapplicable on the basis of Section 4 of the Act, which provides: "Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of...the National Labor Relations Act, or...the Fair Labor Standards Act...." 15 U.S.C. § 1014. This must be interpreted to mean that the labor relations of insurance companies are subject to the NLRA. Section 4 of McCarran-Ferguson provides for the application to

the business of insurance of the Fair Labor Standards Act. 15 U.S.C. § 1014. If this provision were construed to refer to application of the NLRA to state regulation of insurance, as opposed to the state regulation of the labor relations of insurance companies, then similarly it must be construed to refer to the application of the Fair Labor Standards Act to the state regulation of insurance, as opposed to state regulation of minimal standards of employment at insurance companies. However, the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., by its very nature is concerned with the minimum wages and maximum hours in employment and therefore could have no application to state regulation of insurance. Accordingly, 15 U.S.C. § 1014 must refer to the application of the Fair Labor Standards Act to employment

standards of insurance companies and, similarly, to the application of the NLRA to labor relations of insurance companies.

This interpretation is also supported by the recognition that 15 U.S.C. § 1014 is not an exception to 15 U.S.C. § 1012(b) but merely states that nothing in the chapter affects the applicaton of the NLRA to the business of insurance. Accordingly, 15 U.S.C. § 1014 does not impose a limitation on the authorization of state regulation of insurance in 15 U.S.C. § 1012(b) but merely clarifies the irrelevance of that provision to the labor relations of insurance companies. In essence, 15 U.S.C. § 1014 confirms that the phrase "business of insurance" as used in 15 U.S.C. § 1012(b) may not be interpreted as including the labor relations of insurance companies.

CONCLUSION

For the foregoing reasons, the judgment of Supreme Judicial Court of the Commonwealth of Massachusetts should be affirmed.

RESPECTFULLY SUBMITTED,

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